IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RENE FUENTES,
Petitioner.

No. 2 CA-CR 2018-0265-PR
Filed December 10, 2018

Petition for Review from the Superior Court in Pima County
No. CR20150751001
The Honorable Casey F. McGinley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Henry Jacobs PLLC, Tucson
By Henry Jacobs
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Brearcliffe concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Rene Fuentes seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Fuentes has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Fuentes was convicted of theft of a means of transportation, a scooter, and the trial court sentenced him to a five-year term of imprisonment. This court affirmed his conviction and sentence on appeal. *State v. Fuentes*, No. 2 CA-CR 2016-0412 (Ariz. App. July 31, 2017) (mem. decision).

¶3 Fuentes sought post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel based on counsel's failure to inspect the alley in which he had been stopped by a police officer. The trial court summarily denied relief.

¶4 On review, Fuentes again argues counsel was ineffective in failing to inspect the alley. At trial, the officer who attempted to stop him testified that Fuentes had driven the scooter into a dead-end alley, in which the officer intended to make the stop. He stated he had turned on his lights, used an "air blast" of his siren, and gotten out of his vehicle, ordering Fuentes to stop as Fuentes turned and started to ride toward him. In response, the officer pointed his weapon at Fuentes and ordered him to get off the scooter, but Fuentes kept moving forward. The officer then "push[ed] him off the scooter," and Fuentes ran, but was ultimately found and apprehended by officers with a canine unit.

¶5 Fuentes, in contrast, testified he had not known the other man in the alley was a police officer and he had run initially because he was afraid, and then later upon realizing police officers were looking for him, because he had misdemeanor warrants. In closing arguments, the state

argued Fuentes "ran because he knew that he was on a stolen scooter." Fuentes's attorney argued, consistent with his testimony, that he had run from the officer because "he[] [was] scared" as "this guy just pulled a gun on him" and then because of his warrants.

¶6 As below, Fuentes contends that had counsel investigated, she would have discovered that there were other routes out of the alley and that the existence of those routes would undercut the state's argument that Fuentes's flight from the officer suggested guilt. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶7 In this case, we agree with the trial court that counsel's not investigating the alley was not deficient because "[a]ny evidence gathered by trial counsel during the proposed investigation would have no bearing on what [Fuentes] knew at the time of the incident." Fuentes argues the trial court was mistaken in finding that "he did not know about these alternative exits." But, as the court indicated, at trial Fuentes agreed that when he had gone "to the end" of the alley he had "realize[d] there's no outlet." And as the court also stated, at no point did Fuentes "mention noticing, or knowing of, alternate routes by which he could have exited the alley."

¶8 Furthermore, Fuentes has not established that any evidence of an alternate route out of the alley could have changed the outcome of the trial. *Strickland*, 466 U.S. at 694. He argues "the jury had no reasonable explanation for why [he] would attempt to pass by the car, knowing it to be a police vehicle, unless that was his only means of avoiding capture." Thus, he contends, the only conclusion the jury could reach was that he knew the scooter was stolen. But the same question must be asked if one accepts Fuentes's account of events—why would he pass by the car, believing it to be occupied by an unknown gunman, unless that was his only means to avoid being shot? Fuentes has not established that raising questions about any alternative avenues of flight would have changed the inferences drawn by the jury regarding the fact that he fled. We therefore cannot say the trial court abused its discretion in denying relief.

¶9 For these reasons, although we grant the petition for review, we deny relief.